

text and bargaining history of this section. Nothing in this section makes state offset laws part of the CBA, or vests state tribunals or legislatures with the right to interpret or modify the limited time offset provided for in Paragraph 10 of the NFL Player Contract. That provision, like the rest of the CBA, remains subject to the exclusive jurisdiction of the parties' arbitrators, who have conclusively decided what its meaning is. Only they can decide what Paragraph 10 means. Certainly, the parties did not agree to delegate to the 23 states having NFL Clubs the contractual "right" to interpret Paragraph 10, with the end product being a patchwork of disparate decisions that treat players unequally under a uniform CBA.

The NFLPA requests the following remedy in this case: (1) a damages award for any grieving player whose workers' compensation benefits were reduced as a result of a Club obtaining a greater offset than the time offset permitted by Paragraph 10 of the NFL Player Contract; (2) a declaration that Freeman establishes that Paragraph 10 is a time offset only, and that it is a benefit or right to the player, as well as the Club -- in that it defines the scope of the injury benefits provided for in other provisions of the CBA -- and that Freeman is the law of the shop, binding on all Clubs for salary continuance and injury protection; and (3) a declaration that to the extent any state statute purports to create a greater offset and, therefore, diminishes a contractual benefit it is preempted. The NFLPA stresses that it is not asking the arbitrator to order state authorities to do anything, and it is not seeking an order

preventing or limiting the Clubs from making any arguments they want in state proceedings.

The NFLPA also contends that the Clubs' argument that these grievances are untimely insofar as they seek monetary damages is without merit. The source of the injury to the affected players was not the Club's arguing for a greater offset than that provided in Paragraph 10, but the granting of an award by the state tribunal which permitted such an offset and, thereby, reduced the player's contractual injury benefit. In the case of all players, except Peter and Kerner, the grievance was filed within 45 days of such an award, and, therefore, was timely under Article IX, Section 2. In Peter's case, there are no damages yet, as the parties in that workers' compensation proceeding have put the case on hold. In Kerner's case, the NFLPA -- which is not a party in any of the state proceedings -- did not know of the decision within 45 days of the award, but filed an amended grievance to include Kerner -- a former player who could not file a grievance on his own -- in the New York grievance within 45 days of when the NFLPA did learn of the award.

CLUBS POSITION

Initially, the Clubs argue that this arbitrator lacks jurisdiction to resolve these grievances because they involve a dispute over how state law should be interpreted and applied in purely state law proceedings. As recognized in Texas Workers' Comp, state law, not the CBA, determines what benefits a player

who files a claim for workers' compensation benefits under state law is entitled to receive. Any dispute over how such a claim is to be calculated, including the amount of any appropriate offset, always has been presented to, and resolved by, the respective state authorities.

In any event, the Clubs contend, the grievances are meritless because the CBA does not guarantee players any minimum level of workers' compensation benefits, but instead leaves the players' entitlement to such benefits for determination solely by state authorities in accordance with state law.

Paragraph 10 of the NFL Players Contract gives Clubs the contractual right to be reimbursed for money paid to players that the parties deem to be an "advance payment" of workers' compensation. Paragraph 10 confers no affirmative rights upon NFL players that could be subject to violation. Past arbitration decisions have not created any player rights to a minimum level of workers' compensation benefits under state law. The holding in Freeman may be asserted as authority in a subsequent NFL arbitration in which a Club seeks to reduce a CBA benefit by the amount of a state workers' compensation award, but it cannot be extended to preclude Clubs from arguing how a claim for workers' compensation should be determined by state authorities under state law. Donald Smith followed the Florida court's decision in Jarvis in interpreting Paragraph 10 to provide a time offset under Florida law. State decisions in Ohio, Louisiana and Pennsylvania likewise considered Paragraph 10 in determining that laws in those states provided Clubs with

a full dollar-for-dollar offset for advance compensation paid to players for their injuries.

The Clubs insist this is not a case of *Machinists* preemption. A state's determination as to how a particular workers' compensation award should be calculated under state law does not in any way deprive a player of any collectively bargained benefit. The NFLPA's reliance on Freeman and the law of the shop principles is inapposite. The question is not whether Freeman should be followed in a subsequent arbitration involving substantially identical claims under the CBA, or even whether that decision has become part of the CBA and may not be relitigated. The grievances at issue here do not concern a claim, as in Freeman, for injury protection benefits under the CBA.

Neither Freeman nor any of the other arbitration decisions cited by the NFLPA holds that Paragraph 10 only permits a limited time offset and precludes a dollar-for-dollar offset to workers' compensation. Indeed, Arbitrator Kagel himself issued two decisions prior to the 1993 CBA granting a Club a dollar-for-dollar offset. See Harris v. Los Angeles Rams (Kagel 1989) and Miami Dolphins v. Bennett, et al. (Kagel 1990).

The Clubs stress that since Freeman was decided in 1994, Clubs and players -- with the assistance of the NFLPA -- have been arguing in state proceedings over whether Freeman's analysis should be adopted in determining the offset to be provided under state law on the particular facts in issue. This

shows that preemption does not apply, and that the practice established under the CBA is that these issues are to be resolved at the respective state level.

Indeed, the Clubs argue, the Preservation of Rights provision in Article LIV, Section 6 of the CBA protects the Clubs' right to make offset arguments to state authorities. Ever since this provision was included in the CBA in 1993, both parties have routinely argued to state workers' compensation authorities regarding the legality of workers' compensation offset provisions under state law, as Section 6 expressly authorizes.

The Clubs assert that federal court decisions make clear that a party to a CBA cannot obtain declaratory relief precluding the other side from filing grievances or advancing arguments that it believes already have been decided in arbitration. See, e.g., AG Communications Systems Corp. v. Int'l Brotherhood of Electrical Workers, Local 21, 2005 WL731026 (N.D. Ill.). Here the NFLPA seeks to bar the Clubs from ever arguing about the offset issue not only in subsequent arbitration, but even in a forum outside of the CBA under state law.

The Clubs contend that there is no obligation that a state apply state law in a manner consistent with Arbitrator Kagel's decision in Freeman. State authorities are not bound by Freeman in how they interpret Paragraph 10 in the context of applying state workers' compensation statutes. An arbitrator

cannot tell states how they should interpret and apply their own state statutes.

Finally, the Clubs maintain that to the extent the NFLPA is seeking damages for the named players in these grievances, the grievances are untimely. The Clubs assert that the conduct being challenged here is the argument the various Clubs have made at the state level about the application of state workers' compensation offset provisions. The Clubs argue that in each instance the NFLPA was well aware of that far more than 45 days prior to the filing of the grievance.

FINDINGS

In Freeman, the player had received an award of workers' compensation benefits before he was found to be entitled to injury protection benefits under the CBA. After concluding that he was entitled to injury protection, Arbitrator Kagel granted the Club a time offset under Paragraph 10 of the NFL Player Contract.² In Freeman, the parties disagreed on whether Paragraph 10 provided only for a time offset or for a dollar-for-dollar offset. Freeman squarely held that Paragraph 10 only provides for a time offset, and not for a dollar-for-dollar offset. While Freeman involved injury protection, not salary continuance, neither the parties, nor Arbitrator Kagel

² Freeman is consistent with the two prior decisions, Wandler and Green, in which arbitrators granted a club a time offset, although it does not appear that the issue of a time offset versus a dollar-for-dollar offset was raised in either case.

appeared to see any distinction between those contractual benefits for purposes of the offset allowed by Paragraph 10. That is perfectly understandable given the language of Paragraph 10.

Under the holding in Freeman, a Club which has paid salary continuance and/or injury protection to a player who subsequently receives an award of workers' compensation would be entitled to be reimbursed on a time offset basis under Paragraph 10. For purposes of Paragraph 10 it would not seem to matter whether such a time offset was factored into the workers' compensation award itself or was repaid by the player after receiving an award that did not include such an offset.

The Clubs have cited two other arbitration decisions that preceded Freeman, both also decided by Arbitrator Kagel. Bennett was a case decided under the special procedure applicable to the Miami Dolphins who elected not to be covered by the workers' compensation laws of Florida. As Arbitrator Kagel later stressed in Donald Smith, the ruling in Bennett was that a Florida dollar-for-dollar offset statute applicable only to professional athletes did not apply retroactively. Harris was decided on the basis of an individualized insurance provision included in the player's contract which specifically provided for a dollar-for-dollar offset.

Donald Smith can be viewed as implicitly acknowledging that a state law can legitimately provide for a different offset than Paragraph 10 in determining the amount of workers'

compensation to be awarded under state law to a player who has also received contractual benefits, such as salary continuance and/or injury protection, when it states that Jarvis not Freeman was the appropriate precedent to consider. Donald Smith, like Bennett, was decided under the special procedure applicable to the Dolphins, which looks to Florida state law to determine the "equivalent benefits" to be provided under Article LIV, Section 1. Jarvis was a Florida court decision which held that, although Florida law provided for a dollar-for-dollar offset in the case of professional athletes, Florida law also would enforce a contract to provide greater benefits than otherwise mandated by law. The court in Jarvis then read Paragraph 10 of the NFL Player Contract as only providing for a time offset, and determined that was controlling under Florida law. As I read Jarvis, it applies state law, which in this instance looks to the parties' agreement to see if they have agreed to greater benefits than those provided by statute. There is no mention of federal preemption in Jarvis. The only citation is to an earlier Florida workers' compensation decision. Moreover, in Jarvis the Florida court interpreted Paragraph 10 on its own, without any reference to how that provision had been interpreted in arbitration proceedings under the CBA.³

Texas Workers' Comp held that the CBA does not define what workers' compensation benefits a player is entitled to

³ In that case, of course, the Florida court's interpretation coincided with the prior interpretation by Arbitrator Kagel in Freeman. Other courts in states such as Ohio and Pennsylvania have interpreted Paragraph 10 as providing for a dollar-for-dollar offset, contrary to the holding in Freeman.

receive under state law in a case where state workers' compensation coverage applies. That is a matter to be determined under state law. Texas Workers' Comp directed the Texas Clubs not to require players to make an election between contractual benefits guaranteed them under the CBA and workers' compensation benefits under the Texas statute, even though the statute directed the Clubs to do so, because that could place a player in the position of waiving guaranteed contractual benefits in order to receive workers' compensation benefits, when the CBA clearly provides he is entitled to both. The Texas statute required an election be made only when the contractual benefits were greater than the statutory benefits, and that part of the state law was deemed to be preempted.

Texas Workers' Comp involved an election imposed on the players by the Clubs -- albeit in conformity with state law -- not an offset. That decision also recognized that the arbitrator did not have the authority to determine what the consequences of the decision would be in a state workers' compensation proceeding. That does not mean there would be no consequences, but it does mean they would have to be determined in a different forum.

It is in the context of these prior NFL arbitration decisions and the terms of the CBA that the issues raised in this case must be decided.

Freeman clearly decided that Paragraph 10 provides for a time offset only. Under Article IX, Section 8 the decision in

Freeman is binding "upon the player(s) and Club(s) involved and the parties to this Agreement", which includes the NFLPA, the NFLMC and all of the Clubs. As the NFLPA contends, the CBA contemplates a uniform "law of the shop". Freeman's interpretation of Paragraph 10 is the precedent in this shop. Taking into account that the parties have twice renewed the terms of Paragraph 10 without change since Freeman was decided, Freeman is the law of the shop and is binding as such on all of the Clubs, including those involved in these grievances.

There is a separate issue, however, as to whether Paragraph 10 limits the right of a state to provide a greater offset in determining what workers' compensation benefits a player is entitled to under state law. Article LIV, Section 6 makes clear that the parties agreed to disagree over the legality of state offset provisions, and preserved their rights to assert their respective positions on that matter. In particular they agreed that the parties' agreement to Article LIV and to Paragraph 10 would not be the basis of any claim that either party was precluded from making such an assertion. As the NFLPA has stated, the legality question involved two issues -- the constitutionality of state offset laws that provided for a greater offset for NFL players or professional athletes, and whether Paragraph 10 preempted state statutes providing for more than a time offset.

The CBA does not guarantee any particular level or amount of workers' compensation benefits, but rather provides that injured players are entitled to receive workers'

compensation benefits -- whatever they might be -- in addition to contractual benefits. The legality of provisions of state workers' compensation laws is a matter to be decided in the appropriate state or federal forum, not arbitration under the CBA. The parties seemed to have recognized this over the past 12 years during which those issues have been litigated in such tribunals. While neither the NFLPA nor the NFLMC has been a party to such proceedings, they both have participated in raising the respective positions which they preserved the right to do in Article LIV, Section 6.

This arbitrator cannot grant the damages sought by the NFLPA in this case without in effect granting the affected players a greater award of workers' compensation benefits than they were deemed entitled to by a state tribunal applying state law, which is not within my authority to do. Indeed, if the NFLPA believed such damages were available through the grievance and arbitration procedure of the CBA it is difficult to understand why they waited 12 years during which other players were similarly affected by state offset laws before seeking such a remedy.

The issue of preemption can arise in a state workers' compensation proceeding in a variety of contexts. A state law may grant a dollar-for-dollar offset in state workers' compensation proceedings, regardless of what the parties have agreed to regarding offsets in the CBA. A state law may grant a dollar-for-dollar offset unless the CBA provides for a lesser offset (i.e., a greater benefit), as in the Florida cases --

Jarvis and Donald Smith. In the latter situation, it would seem that preemption would only be an issue if the state tribunal concluded that the CBA provides for a dollar-for-dollar offset, which was not the case in the Florida cases. A state law may grant a dollar-for-dollar offset only where that is provided for in the parties' contract -- which apparently is the law in North Carolina.

Where the application of state law turns on what is provided in the CBA, there is an issue as to whether a state tribunal is free to interpret a provision in the CBA -- in this case Paragraph 10 -- on its own without regard to what arbitrators have held or to the law of the shop as determined by arbitrators. In each of these instances, however, the preemption issue is one to be decided by the courts.

What can appropriately be done here, however, is to issue a declaration that: Freeman holds that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset; that this is a benefit or right to the player, as well as the Club; and that this is the law of the shop under this CBA and is binding on all the Clubs. In light of the position taken by some Clubs and/or their workers' compensation insurers in state proceedings -- where they argue, among other things, that Paragraph 10 provides for a dollar-for-dollar offset and/or that Freeman is not the law of the shop or binding on all the Clubs -- the NFLPA has a legitimate interest in obtaining such a declaration because the parties have agreed that the arbitrator, not a court or other tribunal, is to be the

final determiner of what a provision in the CBA means and what constitutes the law of the shop.

AWARD

1. DECLARATION: The decision in Kyle Freeman v. Oakland Raiders (Kagel 1994) holds that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset; this is a benefit or right to the player, as well as the Club; and this is the law of the shop under this CBA and is binding on all the Clubs.

2. The NFLPA's request for other relief is denied for the reasons stated in the above Findings.



Shyam Das, Arbitrator

EXHIBIT D

SHYAM DAS
ARBITRATOR

350 ARDMORE AVENUE
ARDMORE, PA 19003-1032

RECEIVED MAR 15 2007
PHONE: 610-642-7662
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March 13, 2007

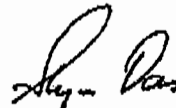
Special Master Stephen Burbank
Harvard Law School
129 Areeda Hall
Cambridge, MA 02138

Re: NFLPA/NFL Workers Compensation
Offset Grievances

Dear Special Master Burbank:

As requested by the parties, I am sending you two copies of my decision in the above-referenced non-injury grievances. The two copies are enclosed in the brown envelope provided to me by the parties to be used for this purpose. It is my understanding that you are to unseal the envelope and provide copies of the Award to both the NFLPA and the NFL Management Council on July 1, 2007.

Very truly yours,



Shyam Das

SD/snr

Enclosure

cc: (without enclosure)
✓ Richard A. Berthelsen, Esq.
Brook F. Gardiner, Esq.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**IN THE MATTER OF THE
ARBITRATION BETWEEN**

**THE NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION On Behalf of
Steve Harvey, David Alexander and Marlon
Kerner**

and

**THE NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL On Behalf of
THE BUFFALO BILLS and THE NEW
YORK JETS**

Civil Action No.

**THE NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION On Behalf of
Charles Smith, Dusty Renfro, Michael Swift
and Jason Peter**

and

**THE NATIONAL FOOTBALL LEAGUE
MANAGEMENT COUNCIL On Behalf of
THE CAROLINA PANTHERS**

**[PROPOSED] ORDER GRANTING PETITION TO CONFIRM ARBITRATION
AWARD AND ENTRY OF JUDGMENT THEREON**

Upon consideration of the Petition and/or other pleadings filed herein, and this Court's determination that it has jurisdiction over the matter, IT IS HEREBY ORDERED THAT the NFLPA's Petition to Confirm Arbitration Award and Entry of Judgment Thereon is GRANTED. The Award of Arbitrator Shyam Das, dated February 14, 2007, attached hereto as Exhibit A, is thus CONFIRMED.

SO ORDERED

DATE:

UNITED STATES DISTRICT JUDGE

EXHIBIT A

SHYAM DAS, ARBITRATOR

In the Matter of Arbitration
Between

----- -)
THE NATIONAL FOOTBALL LEAGUE)
PLAYERS ASSOCIATION On Behalf)
of Steve Harvey, David Alexander)
and Marlon Kerner)
)
and)
)
THE NATIONAL FOOTBALL LEAGUE)
MANAGEMENT COUNCIL On Behalf)
of THE BUFFALO BILLS and)
THE NEW YORK JETS)
----- -)

ARBITRATOR'S OPINION
AND AWARD

February 14, 2007

----- -)
THE NATIONAL FOOTBALL LEAGUE)
PLAYERS ASSOCIATION On Behalf)
of Charles Smith, Dusty Renfro,)
Michael Swift and Jason Peter)
)
and)
)
THE NATIONAL FOOTBALL LEAGUE)
MANAGEMENT COUNCIL On Behalf)
THE CAROLINA PANTHERS)
----- -)

Appearances

For the NFL Players Association:

Richard A. Berthelsen, Esq.
Jeffrey L. Kessler, Esq.
Adam J. Kaiser, Esq.
Kristin A. Meister, Esq.

For the NFL Management Council:

T. David Gardi, Esq.
Daniel L. Nash, Esq.
Brook F. Gardiner, Esq.
Sylvia A. Krainin, Esq.

BACKGROUND

NFLPA/NFL
WC Offset

On May 17, 2005, the NFLPA filed a grievance stating as follows:

Pursuant to Article IX of the NFL 2002-2008 Collective Bargaining Agreement ("CBA"), the NFLPA hereby files a non-injury grievance against the Buffalo Bills, New York Jets (collectively, the "New York Clubs") and the NFL Management Council.

It is our understanding that following the New York State Workers' Compensation Board's decisions in *Steve Harvey*, WCB Case #89516968 (April 4, 2005) and *David F Alexander*, WCB Case #89814852 (April 4, 2005), the Buffalo Bills and the New York Jets are now claiming an offset against money paid to NFL Players Steve Harvey and David Alexander, respectively, for the entire amount of the workers' compensation benefits awarded to those players (i.e., a "dollar for dollar" offset) in the above cited cases.

The New York Clubs' conduct in seeking this dollar for dollar offset violates the express language of Paragraph 10 of the NFL Player Contract, which permits Clubs to take only a limited offset for the amount of workers' compensation benefits due and payable during the same period of time in which a player is deemed to be entitled to his salary under his contract (i.e., a "time" offset). See CBA, App. C (NFL Player Contract) at ¶10. The New York Clubs' conduct likewise violates various NFL arbitration decisions holding that Paragraph 10 permits Clubs to take only a "time" offset, as opposed to a "dollar for dollar" offset. See, e.g., *Kyle Freeman v. Los Angeles Raiders* (Arbitrator Kagel, Dec. 28, 1994).

To the extent that New York state workers' compensation caselaw provides for a greater offset than is permitted by Paragraph 10, and is therefore inconsistent with the terms of the CBA as interpreted in arbitration, such state law is preempted pursuant to federal labor law. See, e.g., *Tampa Bay Area NFL Football, Inc. v. Jarvis*, 668 So. 2d 217, 219 (Fla. Dist. Ct. App. 1996) (applying the "time" offset provided for in Paragraph 10 of the NFL Player Contract instead of the "dollar for dollar" offset provided for by Florida statutory law).

The NFLPA therefore seeks a ruling from the Arbitrator that the New York Clubs must cease and desist from any further attempts to claim offsets for the entire amount of workers' compensation benefits awarded to NFL players (i.e., a "dollar for dollar" offset) instead of the limited "time" offset permitted by Paragraph 10 of the NFL Player Contract. The NFLPA further seeks declarations that (1) Paragraph 10 of the NFL Player Contract provides for a "time" offset and not a "dollar for dollar" offset; (2) the "time" offset in Paragraph 10 applies regardless of whether New York state law provides for a greater offset; and (3) the New York Clubs may not make any further attempts to claim a "dollar for dollar" offset against workers' compensation awards. Finally, the NFLPA seeks any additional remedy that the Arbitrator shall deem just and equitable.

(Underlining in original.)

On September 14, 2005, the NFLPA filed a separate grievance against the Carolina Panthers, which has been

consolidated with the New York grievance for purposes of arbitration. The Panthers grievance states as follows:

Pursuant to Article IX of the NFL 2002-2008 Collective Bargaining Agreement ("CBA"), the NFLPA and players Charles Smith, Dusty Renfro, Michael Swift and Jason Peters [sic] hereby file a non-injury grievance against the Carolina Panthers pursuant to Article IX of the 1993 CBA, as amended.

It has come to the NFLPA's attention that the Carolina Panthers are taking the position that they are entitled to claim a "dollar-for-dollar" offset against workers' compensation awards paid to their players. For example, the Panthers have taken the position within the past month that they are entitled to a "dollar-for-dollar" offset against any workers' compensation award paid to Jason Peters [sic]. The club and/or its insurer has also claimed to the North Carolina Court of Appeals that it is entitled to a dollar-for-dollar offset against the claims of Charles Smith, Dusty Renfro and Michael Swift.... The NFLPA has challenged a similar position taken by the Buffalo Bills and New York Jets in a grievance previously filed on May 17, 2005, and believes that this case can be consolidated with the New York case for purposes of final disposition under Article IX.

In this grievance, the NFLPA requests the same relief from the Panthers that it is currently seeking from the Bills, Jets, and NFL Management Council in the New York case....

On September 14, 2005, the NFLPA also filed an amended grievance to include NFL player Marlon Kerner as an additional grievant in the May 17, 2005, New York grievance, on the basis that: "the Bills have claimed a 'dollar-for-dollar' offset against the entire amount of the workers compensation benefits awarded to Mr. Kerner, in violation of Paragraph 10 of the NFL Player contract."

The consolidated grievances were heard in arbitration on January 10, 2006. The parties filed pre-hearing briefs.

* * *

Players who are injured and unable to play may be entitled to a number of benefits under the Collective Bargaining Agreement (CBA), including salary continuance, as provided in Paragraph 9 of the NFL Player Contract, and injury protection benefit, as provided in Article XII of the CBA.

Since 1977, Paragraph 10 of the NFL Player Contract, which is an integral part of the CBA, has provided:

10. WORKERS' COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation

benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workers' compensation.

One of the issues presented in Freeman v. Los Angeles Raiders (Kagel 1994) -- a case cited by the NFLPA in the present grievances -- was the extent to which the Raiders were entitled to a workers' compensation offset against injury protection payments that Kyle Freeman was found to be eligible to receive in that decision. The Raiders contended they were entitled to a complete "dollar-for-dollar" offset, regardless of the period for which the workers' compensation payments were received. Freeman argued the Club was only entitled to a limited "time" offset. In addressing this issue, Arbitrator Kagel stated:

In view of the decision to award Freeman the monies due him under the Injury Protection provision of the Agreement, the Club contends that it is entitled to an offset for Workers' Compensation monies which have been and may be received by Freeman.

Freeman contends that the offset granted under paragraph 10 should be limited strictly to the amount of Workers' Compensation benefits due and payable to him during the same period in which he was deemed entitled to his salary and/or his Injury Protection benefit.

Paragraph 10 is designed to avoid "double dipping" by a Player in a case where the Player is receiving a salary or injury protection compensation and is also receiving Workers' Compensation by providing that the Club can offset Workers'

Compensation payments against such salary or injury protection payments.

The "period" during which such offsets can be made by the Club is the period of salary payments or the period related to the injury protection period, in Freeman's case the 1993 regular season.

The decision in Freeman on this issue stated: "The Workmen's Compensation for Freeman shall be an offset on a time basis for the 1993 regular season...."

Article LIV (Workers' Compensation) of the CBA provides, in relevant part:

Section 1. Benefits: In any state where workers' compensation coverage is not compulsory, a Club will either voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players. In the event that a player qualifies for benefits under this section, such benefits will be equivalent to those benefits paid under the compensation law of the state in which his Club is located.

* * *

Section 3. Arbitration: In any state where a Club (e.g., Miami Dolphins/Florida) has legally elected not to be covered by the workers' compensation laws of that state, the equivalent benefit, if any, to which a player may be entitled under this Article will be determined under the grievance procedure of Article IX (Non-Injury Grievance).

* * *

Section 6. Preservation of Rights: The NFLPA and the Clubs preserve their prior positions with regard to the legality of workers' compensation offset provisions under state law, and nothing in this Article shall prevent any player from claiming that an offset provision is not legally binding upon him or prevent any Club from asserting that an offset provision is legally binding upon a player. In addition, neither party nor members of the NFLPA's bargaining unit will claim that the other party's agreement to this Article or the revised NFL Player Contract appended hereto affects the rights set forth above.

NFLPA POSITION

The NFLPA asserts that the Clubs are not entitled to a dollar-for-dollar offset under the plain terms of the arbitration decisions interpreting Paragraph 10 of the NFL Player Contract. In addition to Freeman, the NFLPA cites two earlier decisions: Wandler v. Minnesota Vikings (Volz 1990) and Green v. Washington Redskins (Stark 1992). Each of these cases found the purpose of Paragraph 10 was to avoid "double dipping" during the period in which a player is receiving compensation under his contract or the CBA by permitting a time offset only. The same ruling was thereafter applied in Donald Smith NFL Arb. (Malka 1996), aff'd Donald Smith NFL Arb. Appeal (Kagel 1997). No arbitrator has since disagreed.

The NFLPA contends that Freeman and the other relevant arbitration decisions have become part of the CBA and are binding on all Clubs. Article II, Section 1 makes it clear that there is a uniformity rule. All players have to be treated alike, and all Clubs have to be treated the same. Article IX, Section 8 specifically provides:

The decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement....

(Emphasis added.)

All Clubs are parties to the CBA. The preclusive effect of such arbitration is also required by basic principles of federal labor law. Here, not only has Paragraph 10 never been annulled, it was twice ratified and reaffirmed by the parties when the 1993 CBA was extended after the Freeman decision without any change to Paragraph 10. Freeman is the law of the shop, fully binding on each NFL Club, and state and federal courts and administrative bodies are bound to follow it as such. Moreover, the issue of whether the holding in Freeman is the law of the shop and binding on all of the parties to the CBA is a decision for the arbitrator, not for the courts.

The NFLPA insists that Freeman is indistinguishable from the present consolidated grievances. Clearly, Arbitrator Kagel held that the time offset in Paragraph 10 governed all compensation payable to a player under any provision of the CBA

or NFL Player Contract. Indeed, that result is required by the plain language of Paragraph 10. It makes no difference that in the present consolidated case the Clubs reduced the workers' compensation award, not the injury benefit, because the CBA provides that injured employees are entitled to both contractual injury benefits and workers' compensation. See NFLPA v. Dallas Cowboys and Houston Texans (Das 2005), hereinafter referred to as Texas Workers' Comp.

The NFLPA maintains that arbitration decisions interpreting Paragraph 10, like Freeman, preempt inconsistent state laws.¹ In particular, Texas Workers' Comp establishes that where a state workers' compensation law conflicts with a provision of the CBA, the CBA must control. The NFL also cites Tampa Bay Area NFL Football, Inc. v. Jarvis, 668 So. 2d 217 (Fla. Dist. Ct. App. 1996), which it states held that a dollar-for-dollar workers' compensation offset provision in Florida law was preempted by the limited time offset provision in Paragraph 10 of the NFL Player Contract. Moreover, as in Texas Workers' Comp, it is proper and appropriate for this arbitrator to decide the preemption issue.

The NFLPA asserts that the "Preservation of Rights" provision in Article LIV, Section 6 of the CBA merely preserves the parties' prior positions concerning the constitutionality and preemption of state offset laws. This is clear from the

¹ The NFLPA relies on the *Machinists* preemption doctrine. See Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976).

text and bargaining history of this section. Nothing in this section makes state offset laws part of the CBA, or vests state tribunals or legislatures with the right to interpret or modify the limited time offset provided for in Paragraph 10 of the NFL Player Contract. That provision, like the rest of the CBA, remains subject to the exclusive jurisdiction of the parties' arbitrators, who have conclusively decided what its meaning is. Only they can decide what Paragraph 10 means. Certainly, the parties did not agree to delegate to the 23 states having NFL Clubs the contractual "right" to interpret Paragraph 10, with the end product being a patchwork of disparate decisions that treat players unequally under a uniform CBA.

The NFLPA requests the following remedy in this case: (1) a damages award for any grieving player whose workers' compensation benefits were reduced as a result of a Club obtaining a greater offset than the time offset permitted by Paragraph 10 of the NFL Player Contract; (2) a declaration that Freeman establishes that Paragraph 10 is a time offset only, and that it is a benefit or right to the player, as well as the Club -- in that it defines the scope of the injury benefits provided for in other provisions of the CBA -- and that Freeman is the law of the shop, binding on all Clubs for salary continuance and injury protection; and (3) a declaration that to the extent any state statute purports to create a greater offset and, therefore, diminishes a contractual benefit it is preempted. The NFLPA stresses that it is not asking the arbitrator to order state authorities to do anything, and it is not seeking an order

preventing or limiting the Clubs from making any arguments they want in state proceedings.

The NFLPA also contends that the Clubs' argument that these grievances are untimely insofar as they seek monetary damages is without merit. The source of the injury to the affected players was not the Club's arguing for a greater offset than that provided in Paragraph 10, but the granting of an award by the state tribunal which permitted such an offset and, thereby, reduced the player's contractual injury benefit. In the case of all players, except Peter and Kerner, the grievance was filed within 45 days of such an award, and, therefore, was timely under Article IX, Section 2. In Peter's case, there are no damages yet, as the parties in that workers' compensation proceeding have put the case on hold. In Kerner's case, the NFLPA -- which is not a party in any of the state proceedings -- did not know of the decision within 45 days of the award, but filed an amended grievance to include Kerner -- a former player who could not file a grievance on his own -- in the New York grievance within 45 days of when the NFLPA did learn of the award.

CLUBS POSITION

Initially, the Clubs argue that this arbitrator lacks jurisdiction to resolve these grievances because they involve a dispute over how state law should be interpreted and applied in purely state law proceedings. As recognized in Texas Workers' Comp, state law, not the CBA, determines what benefits a player

who files a claim for workers' compensation benefits under state law is entitled to receive. Any dispute over how such a claim is to be calculated, including the amount of any appropriate offset, always has been presented to, and resolved by, the respective state authorities.

In any event, the Clubs contend, the grievances are meritless because the CBA does not guarantee players any minimum level of workers' compensation benefits, but instead leaves the players' entitlement to such benefits for determination solely by state authorities in accordance with state law.

Paragraph 10 of the NFL Players Contract gives Clubs the contractual right to be reimbursed for money paid to players that the parties deem to be an "advance payment" of workers' compensation. Paragraph 10 confers no affirmative rights upon NFL players that could be subject to violation. Past arbitration decisions have not created any player rights to a minimum level of workers' compensation benefits under state law. The holding in Freeman may be asserted as authority in a subsequent NFL arbitration in which a Club seeks to reduce a CBA benefit by the amount of a state workers' compensation award, but it cannot be extended to preclude Clubs from arguing how a claim for workers' compensation should be determined by state authorities under state law. Donald Smith followed the Florida court's decision in Jarvis in interpreting Paragraph 10 to provide a time offset under Florida law. State decisions in Ohio, Louisiana and Pennsylvania likewise considered Paragraph 10 in determining that laws in those states provided Clubs with

a full dollar-for-dollar offset for advance compensation paid to players for their injuries.

The Clubs insist this is not a case of *Machinists* preemption. A state's determination as to how a particular workers' compensation award should be calculated under state law does not in any way deprive a player of any collectively bargained benefit. The NFLPA's reliance on Freeman and the law of the shop principles is inapposite. The question is not whether Freeman should be followed in a subsequent arbitration involving substantially identical claims under the CBA, or even whether that decision has become part of the CBA and may not be relitigated. The grievances at issue here do not concern a claim, as in Freeman, for injury protection benefits under the CBA.

Neither Freeman nor any of the other arbitration decisions cited by the NFLPA holds that Paragraph 10 only permits a limited time offset and precludes a dollar-for-dollar offset to workers' compensation. Indeed, Arbitrator Kagel himself issued two decisions prior to the 1993 CBA granting a Club a dollar-for-dollar offset. See Harris v. Los Angeles Rams (Kagel 1989) and Miami Dolphins v. Bennett, et al. (Kagel 1990).

The Clubs stress that since Freeman was decided in 1994, Clubs and players -- with the assistance of the NFLPA -- have been arguing in state proceedings over whether Freeman's analysis should be adopted in determining the offset to be provided under state law on the particular facts in issue. This

shows that preemption does not apply, and that the practice established under the CBA is that these issues are to be resolved at the respective state level.

Indeed, the Clubs argue, the Preservation of Rights provision in Article LIV, Section 6 of the CBA protects the Clubs' right to make offset arguments to state authorities. Ever since this provision was included in the CBA in 1993, both parties have routinely argued to state workers' compensation authorities regarding the legality of workers' compensation offset provisions under state law, as Section 6 expressly authorizes.

The Clubs assert that federal court decisions make clear that a party to a CBA cannot obtain declaratory relief precluding the other side from filing grievances or advancing arguments that it believes already have been decided in arbitration. See, e.g., AG Communications Systems Corp. v. Int'l Brotherhood of Electrical Workers, Local 21, 2005 WL731026 (N.D. Ill.). Here the NFLPA seeks to bar the Clubs from ever arguing about the offset issue not only in subsequent arbitration, but even in a forum outside of the CBA under state law.

The Clubs contend that there is no obligation that a state apply state law in a manner consistent with Arbitrator Kagel's decision in Freeman. State authorities are not bound by Freeman in how they interpret Paragraph 10 in the context of applying state workers' compensation statutes. An arbitrator

cannot tell states how they should interpret and apply their own state statutes.

Finally, the Clubs maintain that to the extent the NFLPA is seeking damages for the named players in these grievances, the grievances are untimely. The Clubs assert that the conduct being challenged here is the argument the various Clubs have made at the state level about the application of state workers' compensation offset provisions. The Clubs argue that in each instance the NFLPA was well aware of that far more than 45 days prior to the filing of the grievance.

FINDINGS

In Freeman, the player had received an award of workers' compensation benefits before he was found to be entitled to injury protection benefits under the CBA. After concluding that he was entitled to injury protection, Arbitrator Kagel granted the Club a time offset under Paragraph 10 of the NFL Player Contract.² In Freeman, the parties disagreed on whether Paragraph 10 provided only for a time offset or for a dollar-for-dollar offset. Freeman squarely held that Paragraph 10 only provides for a time offset, and not for a dollar-for-dollar offset. While Freeman involved injury protection, not salary continuance, neither the parties, nor Arbitrator Kagel

² Freeman is consistent with the two prior decisions, Wandler and Green, in which arbitrators granted a club a time offset, although it does not appear that the issue of a time offset versus a dollar-for-dollar offset was raised in either case.

appeared to see any distinction between those contractual benefits for purposes of the offset allowed by Paragraph 10. That is perfectly understandable given the language of Paragraph 10.

Under the holding in Freeman, a Club which has paid salary continuance and/or injury protection to a player who subsequently receives an award of workers' compensation would be entitled to be reimbursed on a time offset basis under Paragraph 10. For purposes of Paragraph 10 it would not seem to matter whether such a time offset was factored into the workers' compensation award itself or was repaid by the player after receiving an award that did not include such an offset.

The Clubs have cited two other arbitration decisions that preceded Freeman, both also decided by Arbitrator Kagel. Bennett was a case decided under the special procedure applicable to the Miami Dolphins who elected not to be covered by the workers' compensation laws of Florida. As Arbitrator Kagel later stressed in Donald Smith, the ruling in Bennett was that a Florida dollar-for-dollar offset statute applicable only to professional athletes did not apply retroactively. Harris was decided on the basis of an individualized insurance provision included in the player's contract which specifically provided for a dollar-for-dollar offset.

Donald Smith can be viewed as implicitly acknowledging that a state law can legitimately provide for a different offset than Paragraph 10 in determining the amount of workers'

compensation to be awarded under state law to a player who has also received contractual benefits, such as salary continuance and/or injury protection, when it states that Jarvis not Freeman was the appropriate precedent to consider. Donald Smith, like Bennett, was decided under the special procedure applicable to the Dolphins, which looks to Florida state law to determine the "equivalent benefits" to be provided under Article LIV, Section 1. Jarvis was a Florida court decision which held that, although Florida law provided for a dollar-for-dollar offset in the case of professional athletes, Florida law also would enforce a contract to provide greater benefits than otherwise mandated by law. The court in Jarvis then read Paragraph 10 of the NFL Player Contract as only providing for a time offset, and determined that was controlling under Florida law. As I read Jarvis, it applies state law, which in this instance looks to the parties' agreement to see if they have agreed to greater benefits than those provided by statute. There is no mention of federal preemption in Jarvis. The only citation is to an earlier Florida workers' compensation decision. Moreover, in Jarvis the Florida court interpreted Paragraph 10 on its own, without any reference to how that provision had been interpreted in arbitration proceedings under the CBA.³

Texas Workers' Comp held that the CBA does not define what workers' compensation benefits a player is entitled to

³ In that case, of course, the Florida court's interpretation coincided with the prior interpretation by Arbitrator Kagel in Freeman. Other courts in states such as Ohio and Pennsylvania have interpreted Paragraph 10 as providing for a dollar-for-dollar offset, contrary to the holding in Freeman.

receive under state law in a case where state workers' compensation coverage applies. That is a matter to be determined under state law. Texas Workers' Comp directed the Texas Clubs not to require players to make an election between contractual benefits guaranteed them under the CBA and workers' compensation benefits under the Texas statute, even though the statute directed the Clubs to do so, because that could place a player in the position of waiving guaranteed contractual benefits in order to receive workers' compensation benefits, when the CBA clearly provides he is entitled to both. The Texas statute required an election be made only when the contractual benefits were greater than the statutory benefits, and that part of the state law was deemed to be preempted.

Texas Workers' Comp involved an election imposed on the players by the Clubs -- albeit in conformity with state law -- not an offset. That decision also recognized that the arbitrator did not have the authority to determine what the consequences of the decision would be in a state workers' compensation proceeding. That does not mean there would be no consequences, but it does mean they would have to be determined in a different forum.

It is in the context of these prior NFL arbitration decisions and the terms of the CBA that the issues raised in this case must be decided.

Freeman clearly decided that Paragraph 10 provides for a time offset only. Under Article IX, Section 8 the decision in

Freeman is binding "upon the player(s) and Club(s) involved and the parties to this Agreement", which includes the NFLPA, the NFLMC and all of the Clubs. As the NFLPA contends, the CBA contemplates a uniform "law of the shop". Freeman's interpretation of Paragraph 10 is the precedent in this shop. Taking into account that the parties have twice renewed the terms of Paragraph 10 without change since Freeman was decided, Freeman is the law of the shop and is binding as such on all of the Clubs, including those involved in these grievances.

There is a separate issue, however, as to whether Paragraph 10 limits the right of a state to provide a greater offset in determining what workers' compensation benefits a player is entitled to under state law. Article LIV, Section 6 makes clear that the parties agreed to disagree over the legality of state offset provisions, and preserved their rights to assert their respective positions on that matter. In particular they agreed that the parties' agreement to Article LIV and to Paragraph 10 would not be the basis of any claim that either party was precluded from making such an assertion. As the NFLPA has stated, the legality question involved two issues -- the constitutionality of state offset laws that provided for a greater offset for NFL players or professional athletes, and whether Paragraph 10 preempted state statutes providing for more than a time offset.

The CBA does not guarantee any particular level or amount of workers' compensation benefits, but rather provides that injured players are entitled to receive workers'

compensation benefits -- whatever they might be -- in addition to contractual benefits. The legality of provisions of state workers' compensation laws is a matter to be decided in the appropriate state or federal forum, not arbitration under the CBA. The parties seemed to have recognized this over the past 12 years during which those issues have been litigated in such tribunals. While neither the NFLPA nor the NFLMC has been a party to such proceedings, they both have participated in raising the respective positions which they preserved the right to do in Article LIV, Section 6.

This arbitrator cannot grant the damages sought by the NFLPA in this case without in effect granting the affected players a greater award of workers' compensation benefits than they were deemed entitled to by a state tribunal applying state law, which is not within my authority to do. Indeed, if the NFLPA believed such damages were available through the grievance and arbitration procedure of the CBA it is difficult to understand why they waited 12 years during which other players were similarly affected by state offset laws before seeking such a remedy.

The issue of preemption can arise in a state workers' compensation proceeding in a variety of contexts. A state law may grant a dollar-for-dollar offset in state workers' compensation proceedings, regardless of what the parties have agreed to regarding offsets in the CBA. A state law may grant a dollar-for-dollar offset unless the CBA provides for a lesser offset (i.e., a greater benefit), as in the Florida cases --

Jarvis and Donald Smith. In the latter situation, it would seem that preemption would only be an issue if the state tribunal concluded that the CBA provides for a dollar-for-dollar offset, which was not the case in the Florida cases. A state law may grant a dollar-for-dollar offset only where that is provided for in the parties' contract -- which apparently is the law in North Carolina.

Where the application of state law turns on what is provided in the CBA, there is an issue as to whether a state tribunal is free to interpret a provision in the CBA -- in this case Paragraph 10 -- on its own without regard to what arbitrators have held or to the law of the shop as determined by arbitrators. In each of these instances, however, the preemption issue is one to be decided by the courts.


What can appropriately be done here, however, is to issue a declaration that: Freeman holds that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset; that this is a benefit or right to the player, as well as the Club; and that this is the law of the shop under this CBA and is binding on all the Clubs. In light of the position taken by some Clubs and/or their workers' compensation insurers in state proceedings -- where they argue, among other things, that Paragraph 10 provides for a dollar-for-dollar offset and/or that Freeman is not the law of the shop or binding on all the Clubs -- the NFLPA has a legitimate interest in obtaining such a declaration because the parties have agreed that the arbitrator, not a court or other tribunal, is to be the

final determiner of what a provision in the CBA means and what constitutes the law of the shop.

AWARD

1. DECLARATION: The decision in Kyle Freeman v. Oakland Raiders (Kagel 1994) holds that Paragraph 10 of the NFL Player Contract provides only for a time offset, and not for a dollar-for-dollar offset; this is a benefit or right to the player, as well as the Club; and this is the law of the shop under this CBA and is binding on all the Clubs.

2. The NFLPA's request for other relief is denied for the reasons stated in the above Findings.



Shyam Das, Arbitrator